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SUPREME COURT OF THE UNITED STATES.

No. ~~382.~~ 117

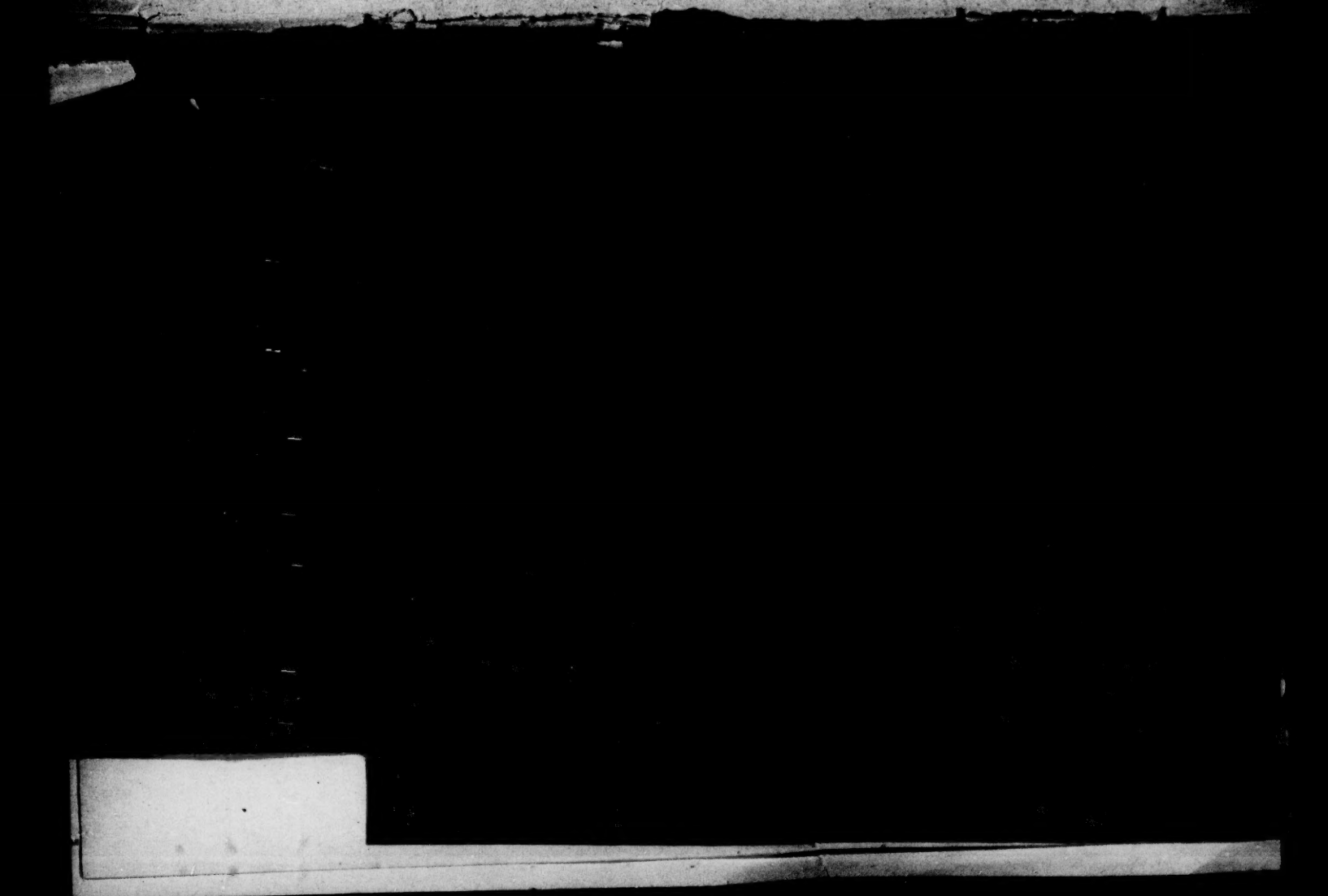
E. E. PATTERSON, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 4, 1876.



SUPREME COURT OF THE UNITED STATES.

No. 382.

E. E. PATTERSON, PLAINTIFF IN ERROR,

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 State of Kentucky, court of appeals.

At a court of appeals held for the State aforesaid, at Frankfort, the capital, on the 22d day of September, 1875—
Present, Peters, chief justice; Lindsay, Pryor, and Cofer, judges.

Appeal from Paducah City court.

E. E. PATTERSON, APPELLANT,
vs.
COMMONWEALTH, APPELLEE.

Be it remembered that on the 11th of February, 1875, the above-named appellant filed in the clerk's office of the court of appeals of the State aforesaid the following transcript of a record from the Paducah city court in which an appeal has been granted by said City court to this court. Said transcript is as follows:

2 Pleas before J. M. Bloomfield, judge of the Paducah City court, at the court-house in Paducah, January 4th, 1875.

COMMONWEALTH OF KENTUCKY, PLAINTIFF,
against
E. E. PATTERSON, DEFENDANT. } Selling condemned oil.

Be it remembered that heretofore, to wit, December 11th, 1874, the following order was made, viz:

Indictment filed.

This day came the grand jury and, through their foreman, presented the following additional indictments: * * * and one against E. E. Patterson for "selling condemned oil."
Summons was ordered on said indictment, and it ordered filed, and said prosecution set down for the 9th day of the term.

Indictment.

The indictment referred is in words and figures following, viz:
The grand jury of the city of Paducah, in the name and in the authority of the commonwealth of Kentucky, accuse E. E. Patterson of the offence of selling oil, the product of coal, petroleum, or other bitum'ous substances, which has been condemned by the inspector and
3 branded "unsafe for illuminating purposes," committed as follows, viz: The said E. E. Patterson, on the 11th day of December, one thousand eight hundred and seventy-four, in the city aforesaid, did sell oil, the product of coal, petroleum, or other bitum'ous substances, known as Aurora Oil, to be consumed and used in this State for illuminating purposes, to Alfred Davis, which Aurora Oil, so sold, had before the said sale thereof by said E. E. Patterson been regular' inspected according to law by an authorized inspector of this State, appointed for that purpose by the judge of the McCracken County court, and by him, the said inspector, condemned, and the barrels containing said oil branded by him "unsafe for illuminating purposes," against the peace and dignity of the commonwealth of Kentucky.

(Endorsed on back of indictment:) Witnesses, W'm Patterson, John Ewell.

A true bill.

E. W. BAGBY,
City Prosecuting Att'y.

(Signed) W. H. SLACK,
Foreman.

Summons.

Summons against E. E. Patterson returned by the marshal of the city of Paducah executed December 15th, 1874.

Order and verdict.

Afterwards, December 17th, 1874, the following order was made, viz:

4 This day appeared the Commonwealth, by attorney; the defendant, E. E. Patterson, appeared by attorney, when the agreement in writing of the facts as to the jurisdiction of the court and the right to impose any fine, by virtue of the State statutes, were signed and filed; whereupon a plea of not guilty was entered, and a jury to assess the fine was called, to wit: Ja's Smith, W. A. Mosely, John Grief, J. W. Tapscott, J. D. Furgerson, George Wright, H. Schoolcraft, Tho's Moore, W. B. Johnson, Ja's McMurty, R. A. Burns, and W'm Rawlings, were empannelled and duly sworn to try the issue. Whereupon the jury returned the following verdict into court, to wit:

We of the jury find the defendant guilty as charged in the within indictment, and assess her fine at two hundred and fifty dollars.

W. B. JOHNSON,
One of the Jury.

The Commonwealth moved for judgment in accordance with the verdict of the jury, and the motion and further orders were continued until the questions of law as in the written agreement should be decided.

Agreed facts filed.

The following are the agreed facts filed and referred to in foregoing order, to wit:

In the case on indictment it is agreed that a patent was granted, number 63229, March 26th, 1867, to Henry C. Dewit, of S't Louis,
5 for a new and improved burning-oil, called and known as Aurora Oil, and that M'r's E. E. Patterson, as assignee, by assignment duly recorded, has the exclusive right to make, construct, use, and vend to others said oil, in Lyon, Livingston, Crittenden, and Henderson Counties, in Kentucky, east of the Tennessee River, and McCracken, Ballard, Graves, Calloway, and Marshall Counties, west of the Tennessee River, in Kentucky; that said defendant has sold said oil in some of said counties ever since the year of 1869, in Henderson County and in McCracken County ever since May, 1870, and that said oil has grown in its extensive use and popularity as a burning-fluid, and that her trade has enlarged and expanded in said oil ever since she began selling the same, until now her trade per year may be set down at three hundred barrels.

It is further agreed that the State inspector for McCracken County, appointed by the McCracken County court, under the State statutes, John Ewell, came to the defendant's place of business in Paducah, December 4th, 1874, to inspect her oil. The said inspector of McCracken County then inspected nineteen barrels of her Aurora Oil, and branded them as unsafe for illuminating purposes, because the test would not and did not conform to the "act of the legislature of Kentucky," approved Feb'y 21st, 1874, to take effect sixty days thereafter. The defendant then consulted attorneys as to her legal right, who advised her that the said State statutes had no application to her Aurora Oil, and that the inspector had no right to inspect and condemn it, and advised her she had the right to sell it under her patent privilege, although it did not come up to the standard, 130 degrees fire-test, and also advised her not to permit said inspector for McCracken County to inspect any more of her said Aurora Oil.

6

It is agreed that under this advice, after said oil was so condemned, and before the indictment, she continued to sell said condemned Aurora Oil, and sold any time.

It is further agreed that on December 12th, 1874, after the finding of said indictment, said State inspector for McCracken County, John Ewell, demanded to inspect other barrels of said Aurora Oil then in her possession in her business house in Paducah, and which she had with the intent and purpose of vending the same as a burning-fluid, and that she, under the advice of her legal counsel, did refuse to let him inspect her said Aurora Oil, which was the article patented as aforesaid and which she was vending as assignee of said patentee, and which she claims the right to sell and vend under said patent, issued aforesaid by authority and under the Constitution and laws of the United States.

7

It is further agreed that said Aurora Oil will not stand the test of the State statute, and that said patented Aurora Oil cannot be made to stand the test of the State statute. It is impossible by any chemical combination as set out and described in the patent to conform to the State statute.

The question of jurisdiction of the said city court on the agreed facts is submitted, either party to have the right of appeal. In order to test the legality of these questions and whether the court has jurisdiction of the case, and whether the State law does or can constitutionally apply to defendant's case, it is agreed that a jury may assess the fine of two hundred and fifty dollars on the indictment, on the agreed facts, but the questions of law shall be determined by the court any judgment thereon is rendered.

8

An official copy of the letters patent and specifications, hereto annexed, granted to Henry C. Dewit by the United States authorities, dated March 26th, 1867, is made part of this agreement. The facts alledged in the indictment are to be taken as true.

E. W. BAGBY,
City Prosecuting Attorney.
E. E. PATTERSON,
By R. K. WILLIAMS,
Attorney.

The following are exhibits referred to in agreed facts, to wit:

Letters patent No. 63229.

The United States of America to all whom these letters patent shall come:

Whereas Henry C. Dewitt, of S't Louis, Missouri, has alledged that he has invented a new and useful improved burning-oil, which
9 he states has not been known or used before such invention; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said invention, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents, praying that a patent may be issued therefor:

These are therefore to grant, according to law, to the said Henry C. Dewitt, his heirs, administrators, or assigns, for the term of seventeen years from the twenty-sixth day of March, one thousand eight hundred and sixty-seven, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention, a description whereof is given in the schedule hereinto annexed and made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office to be hereto affixed. Given
10 under my hand, at the city of Washington, this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and sixty-seven, and of the Independence of the United States of America the ninety-first.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[L. S.] T. C. THEAKER,
Commissioner of Patents.

The following is a certificate of the letters patent granted to Henry C. Dewit March 26, 1867, to wit:

The United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Henry C. Dewit, dated March 26th, 1867, No. 63229, for "Improved Burning-Oil."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereinto affixed this sixth day of June, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

{ PATENT OFFICE UNITED STATES OF AMERICA. L. S. } J. M. THACKER,
Acting Commissioner.

11 *Schedule.*

The following is the schedule referred to in these letters patent, and making part of the same, to wit:

UNITED STATES PATENT OFFICE.

Henry C. Dewit, of S't Louis, Missouri.—Letters patented No. 63229, dated March 26th, 1867.—Improved Burning-Oil.

To all whom it may concern:

Be it known that I, H. C. Dewit, of the city and county of S't Louis

and State of Missouri, have invented a new and useful improvement in burning or illuminating oils, which I designate as Aurora Oil, and I do hereby declare that the following is a full and clear description thereof, which will enable those skilled in the art to make and use my improved oil. As the body of the said oil, I take the product of coal-oil known as gasoline, which, from its exceedingly volatile and explosive nature, is now nearly or quite commercially worthless.

The whole of the ingredients I will designate by letters of the alphabet for convenience.

Letter A stands for gasoline, of which the proportion is about forty gallons.

12 Letter B stands for powdered alum, of which the proportion is about four pounds.

Letter C stands for cut potatoes, of which the proportion is about two quarts.

Letter D stands for pure carbon oil, of which the proportion is about two gallons.

Letter E stands for alcohol, of which the proportion is about one quart.

Letter F stands for gum-camphor, of which the proportion is about two ounces.

Letter G stands for oil of sassafras, of which the proportion is about eight ounces.

Letter H stands for acetic potash, of which the proportion is about one pound.

Letter I stands for sal-soda, of which the proportion is about two pounds.

The mode of manufacturing the new illuminating oil is as follows:

I take the ingredients A, forty gallons of gasoline. B, four pounds of powdered alum. C, two quarts of common potatoes cut fine, and mix them in an open-topped vessel, and let them stand for two or three days, during which time the explosive and volatile nature of the gasoline will pass off harmlessly and without perceptibly diminishing the bulk or quantity of the liquid.

To now properly prepare the said mixture, I add thereto the in-

13 gredients severally marked D, E, F, G, H, and I in the proportion of measure and weights for each heretofore stated.

In a comparativ'ly short time, say two to eight hours, the clear liquid is ready for use, the same being then of the proper or standard specific gravity, having an aqueous transparency, and giving, when burned in a proper burner, a clear and brilliant white light of high photometrical quality. Of said ingredients thus described as being useful to form my said improved burning-fluid, the following are to be deemed as essential: A, B, C, F, H, and I, and I do therefore insist that these said ingredients, or their chemical equivolents, are especially included in the nature of my invention.

The ingredients E is added to facilitate the solubility of other ingredients, but I do not deem the same necessary, and the ingredients G, or an equivolent essential oil, is used to counteract the odor of certain more volatile carbureted hydrogen, and act as a deodorizer of the oil.

Having now fully described my said invention, what I claim is

14 the mixture formed from and by action of the ingredients A, B, C, D, E, F, G, H, and I, substantially as set forth.

H. C. DEWIT.

Witnesses:

M. RANDOLPH,

GEO. P. HERTHEL, JR.

Judgment.

Afterwards, January 4th, 1875, the following order was made, to wit: This day again came the Com'th by attorney; the defendant, E. E. Patterson, by her attorney. The arguments of the counsel being heard, and the court being sufficiently advised, it is adjudged that the motion of the Commonwealth for judgments in accordance with the verdict of the jury be sustained, and thereupon, therefore, it is adjudged by the court that the Commonwealth recover of E. E. Patterson, defendant, the sum of two hundred and fifty dollars, and her costs of this prosecution herein expended, for which capias pro fine may issue.

Order.

Afterwards, January 8th, 1875, the following order was made, to wit: This day again came the parties by attorneys, and the defend-
15 ant, E. E. Patterson, filed reasons and moved the court for a new trial. The court being sufficiently advised, the motion for a new trial is overruled, to which overruling the defendant, E. E. Patterson, excepts. The defendant, E. E. Patterson, filed bill of exceptions, No. 1, and also filed bill of evidence, No. 2.

Appeal.

The defendant prays an appeal to the court of appeals, which is granted upon condition that she lodge in the clerk's office of said court a transcript of the record within sixty days from the date of judgment.

Reasons for new trial.

The following are the reasons for a new trial, and exceptions No. 1, and bill of evidence No. 2, filed Jan'y 8th, 1875, to wit:

The defendant, E. E. Patterson, moves the court to set aside the verdict and judgment herein, and to grant her a new trial, and to dismiss the prosecution against her, first, because the oil which was inspected by Jno. Ewell, inspector for the State of Kentucky, in and for McCracken County, was patented by the United States of America, to H. C. Dewit, of St Louis, and she had the exclusive right to sell and
16 vend said oil in McCracken County, and city of Paducah, as assignee of said patentee.

Second. Because there was no law, valid and constitutional, in the State of Kentucky authorizing said Ewell, as inspector aforesaid, to inspect and condemn Aurora Oil, patented aforesaid, to H. C. Dewit.

Third. Because the act of the Kentucky legislature, approved February 21st, 1874, entitled "An act to amend article one, chapter 59, of general statutes, &c.," does not authorize said Ewell, as inspector, to inspect and condemn said Aurora Oil as "unsafe for illuminating purposes," it being patented as aforesaid.

Fourth. Because said act of the legislature of Kentucky conflicts with the patent laws of the United States and the rights of patentees under said laws of the United States, and is therefore invalid and void as to her and her rights to sell and vend said Aurora Oil, as assignee of the patentee.

Fifth. Because said State statutes is void as to her and her right to sell and vend said Aurora Oil.

17 Sixth. Because she has violated no valid and binding law,

Seventh. Because the evidence is insufficient to show she has committed any offense against any valid existing law.

Eighth. Because this court has no jurisdiction in this case.

Exceptions.

No. 1. Be it remembered, that the defendant denies the jurisdiction of the court, and moved to dismiss the case upon the agreed facts, in writing, filed in this case, and a copy of the letters patent by the United States to H. C. Dewit (as referred to in copy of agreement and of the letters patent), but the court overruled the motion; to which defendant excepts, and still excepts.

Second. The plaintiff moved the court for a judgment on the verdict, which the defendant opposed, but which motion the court sustained, and rendered a judgment on the verdict of the jury for two hundred and fifty dollars and costs, to which defendant objected and excepted, and still excepts.

Third. The defendant then filed reasons for a new trial and to
18 set aside the verdict and judgment herein (as referred to in reasons for a new trial), which the court overruled; to which defendant excepts, and prays an appeal.

(Signed) JNO. W. BLOOMFIELD,
Judge Paducah City Court.

Bill of evidence No. 2.

Be it remembered, that on the trial of this case, the agreed facts as per writing filed herein (as referred to in agreed facts) and a certified copy of the letters patent by the United States to Henry C. Dewit, as set out in said written agreed facts, which letters patent and agreed facts referred to, were read to the jury, and this was all the evidence in the case.

(Signed) JNO. W. BLOOMFIELD,
Judge Paducah City Court.

Supersedeas bond.

The following is the supersedeas bond in said case, to wit:

THE COMMONWEALTH OF K'Y, PL'FF,
against
E. E. PATTERSON, DEF'T.

The defendant, E. E. Patterson, having prayed an appeal from the judgment of the Paducah city court, rendered herein against her at its January term, 1875, for a fine of two hundred and fifty dollars
19 and costs, now we covenant to and with the plaintiff that in case said judgment is affirmed, we will pay said fine and costs, and all damages thereon, and the costs of the appeal, and that the defendant will surrender herself in execution of the judgment.

Witness our hands this the 4th day of Feb'uary, 1875.

D. D. THOMPSON.
A. J. PATTERSON.

STATE OF KENTUCKY,
Paducah City Court, sct:

I, John H. Morgan, clerk of the Paducah city court aforesaid, do certify that the foregoing fifteen and one-fourth written pages contain

a full, true, and complete transcript in the action therein named, as the same appears of record and on file in my office.

Given under my hand, as clerk of said court, this Feb'uary 4th, 1875.

JNO. H. MORGAN,
Clerk

(Indorsed :) E. E. Patterson vs. Com'th of K'y. From Paducah city court. Paducah city court. R. K. Williams, ap'l't.

20 At a court of appeals held for the State aforesaid, at Frankfort, the capital, on 7th day of June, 1875:

Cause argued & submitted.

This day this cause came on and was argued by John Rodman, attorney-general, for appellee, and A. Duvall, for appellant, and submitted; but the court, not being sufficiently advised, took time.

Judgment of court appeals.

And at a court of appeals held as aforesaid on 22d day of September, 1875:

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant ten per cent. damages on the amount of the judgment superseded herein.

It is also considered that appellee recover of appellant her costs herein expended.

21 *Opinion of court appeals.*

The following is the opinion of the court of appeals in foregoing cause, rendered on 22d day of September, 1875, viz:

Kentucky court of appeals, September 22d, 1875.

E. E. PATTERSON
vs.
COMMONWEALTH. } From Paducah City court.

Judge Pryor delivered the opinion of the court, as follow':

The appellant was indicted under the provisions of the statute of February 21, 1874, entitled "An act for inspecting and gauging oils, liquids," &c.

Section 6 of this act imposes a fine not exceeding five hundred dollars upon any person or persons who shall sell or offer to sell in this State, for illuminating purposes, oils or fluids, the product of coal, petroleum, or other bituminous substances that will ignite or permanently burn at a temperature less than 130 degrees Fahrenheit; also the same penalty upon those who sell in this State such fluids, after they have been condemned by an authorized State inspector, and the barrels or packages branded by him "unsafe for illuminating purposes."

Appellant was engaged in selling an oil at her business house, in

Paducah, known as "Aurora Oil," and the State inspector having tested 19 barrels of this oil as provided by the statute, branded them "unsafe for illuminating purposes," for the reason that it failed to stand the test required by the statute. It is agreed by the parties that this oil cannot be made to conform to the requirements of the statute, and that the appellant sold the fluid as charged in the indictment. A fine of two hundred and fifty dollars was imposed upon the appellant, from which she prosecutes this appeal.

The defense is, that the oil sold by appellant was a patented article, and, as assignee of Dewitt, the patentee, she had the right to vend it in the counties of McCracken and other adjoining counties, although in violation of the statute; that the State of Kentucky had no power to regulate by legislation the mode of selling articles for the invention of which a patent-right had been obtained from the federal government, as long as the exclusive use of the patent-right is vested in the patentee or his assignee.

The power of Congress to legislate in regard to patents is derived from section 8 of article 1 of the federal Constitution, that provides: "The Congress shall have power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The opinion of Justice Davis in the case of the State vs. Robinson, 4 Fisher's Reports, page 187, is relied on as sustaining the views presented by the defense in this case. There is no analogy in the facts of that case and the one before us. The legislature of Indiana enacted a law regulating the sale of patent-rights, by requiring the patentee, before he disposed of the right, to file a copy of the patent in the county clerk's office, and to make an affidavit that the letters-patent were genuine, and had not been canceled. Robinson, as the agent of the patentee, sold or offered to sell a patent-right without complying with the provisions of the statute, and, having been imprisoned by the judgment of the State court for this offense, Justice Davis held that he should be discharged from custody for the reason "that this power had been exercised by Congress directing the manner in which patents shall be obtained, and, when obtained, how they shall be assigned and sold."

It is further said in the opinion: "The property in inventions exists by virtue of the laws of Congress. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property."

There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. A State has no power to say through its legislature that the patentee shall not sell his patent, or that its use shall be common to all of its citizens, for this would be in direct conflict with the law of Congress; and that portion of the opinion referred to, giving the patentee an unrestricted power to sell, has allusion alone to his right of property in the patent-right, as that was the only question involved in the case. The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of Congress, and no State legislature can deprive him of this right; but when the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a State, it is subject to its laws like other property, and such has been the uniform decision of all the courts, State and Federal, upon this question. Chief Justice Kent, in the case of

Livingstone vs. Van Ingen, 9th Johnson, page 581, said: "The power of Congress is only to define the right of property, it does not extend to regulating the use of it—that must be exclusively of local cognizance. If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains within the States to restrain the use of the patent right."

The 26th section of the internal-revenue act of March 2, 1867, makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale or to sell oil made of petroleum for illuminating purposes, inflamable at less temperature or fire-test than 110 degrees Fahrenheit. Under this law Dewitt was indicted in the U. S. circuit court for the eastern district of Michigan, charged with offering oil for sale in Detroit in violation of the statute. There was a demurrer to the indictment, and the judges below dividing in opinion, the case was taken to the Supreme Court, and the question there made was, whether the facts charged in the indictment constituted any offense under any valid and constitutional law of the United States. Chief Justice Chase, delivering the opinion of the court, said: "That the enactment was a mere police regulation, and can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example in the District of Columbia. Within State limits it can have no constitutional operation." (United States vs. Dewitt, 9th Wallace, page 41.) This construction of the power of Congress is fully sustained by all the authorities we have been able to find where the question was either directly or indirectly involved. The right of the appellant to sell oil is not derived from the patent-laws of Congress. If no patent had been issued, the right to sell this character of property would exist, and the only benefit to be derived from the patent is, that it excludes others from selling the same kind of oil for a limited period, unless authorized to do so by the patentee, with the additional right on the part of the latter to sell and transfer his patent-right in the mode prescribed by the patent-laws. The right of a State to protect its citizens from the danger attending the use of such fluids although patented, is not inconsistent with any patent regulation, nor in violation of the federal Constitution.

Judgment affirmed.

22 At a court of appeals held as aforesaid on 17 Nov'r, 1875,

On motion of appellant, by counsel, an appeal is granted him herein to the Supreme Court of the United States.

At a court of appeals held as aforesaid on 18th January, 1876,

Came appellant, by counsel, and filed a power of attorney, and thereupon offered to execute a supersedeas bond herein; but the court, not being sufficiently advised, took time.

And at a court of appeals held as aforesaid on 25th of January, 1876,

The court being sufficiently advised, it is considered that appellant's motion to execute a supersedeas bond herein be overruled.

23 STATE OF KENTUCKY,
Court of Appeals, set:

I, Thomas C. Jones, clerk of court of appeals for State aforesaid, do hereby certify that the foregoing twenty pages contain a full and complete transcript of the record and proceedings had in the case of E. E. Patterson, appellant, vs. The Commonwealth, appellee.

In testimony whereof I have hereunto set my hand and official seal, at my office in Frankfort, the capital, State of Kentucky, this 17th day of February, 1876.

[SEAL.] THO'S C. JONES, *C. C. A.*
By VIRGIL HEWITT, *D. C. C. A.*

Fee for record, $7.70; certificate & seal, 1.30—$9.00.

24 STATE OF KENTUCKY,
City of Frankfort, sct:

E. E. PATTERSON, APPELLANT,
vs.
COMMONWEALTH OF KENTUCKY, APPELLEE.

I, B. J. Peters, chief justice of the court of appeals of Kentucky, do certify that appellant having been indicted, in a court of the State aforesaid having jurisdiction thereof, for selling oil in the said State, used for illuminating purposes, called "Aurora Oil," which oil had been before the sale thereof in said State condemned as dangerous by an inspector thereof appointed by the legally constituted authority, under an act of the legislature of the State of Kentucky, and appellant having been tried and convicted of said alleged offense in the court of original jurisdiction, and having been adjudged to pay a fine of two hundred and fifty dollars, prosecuted an appeal from said judgment to the court of appeals of Kentucky, and said judgment was affirmed on the 22nd day of September, A. D. 1875, and the said E. E. Patterson,
25 desiring to prosecute an appeal from the last-named judgment of affirmance to the hon'l' the Supreme Court of the United States of America—

And I do further certify that the appeal involves the question whether the State law which prohibits the sale of said oil within its limits is an infringement of the patent-right of the inventor of the Aurora Oil, and is in conflict with the laws of the Congress of the United States, and an appeal therefore is granted M'r's E. E. Patterson to the hon'l' the Supreme Court of the United States of America.

Done at Frankfort this 17th day of February, A. D. 1876.

B. J. PETERS,
Chief Justice of the State of Kentucky.

26 *Writ of error.*

UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judges of the appellate court of the State of Kentucky, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said appellate court before you between M'r's E. E. Patterson, plaintiff, and The Commonwealth of Kentucky, defendant, wherein was drawn into question the right to vend an oil known as "Aurora Oil," patented by the United States to Henry C. Dewit, said M'r's E. E. Patterson, being the vendee and possessed of the exclusive right to vend said Aurora Oil in McCracken County, State of Kentucky, under the several acts of the Congress of the United States in relation to granting patents, &c., and by virtue of the transfer to her

of the exclusive right to vend said oil in said McCracken County aforesaid, and the legislature of the State of Kentucky having passed
27 an act entitled "An act to amend article 1, chapter 39, of the general statutes, and to repeal an act to regulate the sale and storage of oils made from coal, petroleum, and other bituminous substances, and for the better protection of property, approved March 21, 1870, and the acts amendatory thereto, severally approved February 24, 1873, and March 8, 1873, and further to regulate the inspection and *guaging* of burning-fluid," approved February 21, 1874, by which she was prohibited from selling in said State of Kentucky and McCracken County said patented Aurora Oil, and the court having decided against her said right and the validity of the said several acts of Congress giving to patentees and their vendees the right to vend said patented articles, and sustained the validity of said State statute, and the Paducah city court in said McCracken County having adjudged a fine of two hundred & fifty dollars & costs against her, which said appellate court of the State
28 of Kentucky has affirmed, a manifest error has happened, to the great damage of said M'r's E. E. Patterson, as by her complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf—

You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. *B.* Waite, Chief Justice of the Su-
29 preme Court of the United States, and the seal of the circuit court for the sixth circuit and district of Kentucky, at Paducah, in said district, this 12 day of February, A. D. 1876, and of the Independence of the United States the 100th.

[6 CIRCUIT COURT K'Y DIS., U. S. OF AMERICA.]

JOHN R. PURYEAR,
Clerk.

Allowed March 16, 1876.

B. J. PETERS,
Chief Justice of K'y.

The appeal-bond executed herein is as follows, viz:

Circuit court of the United States, sixth circuit and district of Kentucky.

Know all men by these presents, that we, E. E. Patterson, principal, and M. A. Harris, are held and firmly bound unto the above-named Commonwealth of Kentucky in the sum of six hundred dollars, to be paid to the said Commonwealth of Kentucky, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 10th day of February, A. D. 1876.

30 Whereas the above-named M'r's E. E. Patterson hath prosecuted a writ of error to the Supreme Court of the United States to re-

verse the judgment rendered in the appellate court of Kentucky, setting at Frankfort, against the said M'r's E. E. Patterson in the case of *the* M'r's E. E. Patterson versus The Commonwealth of Kentucky:

Now, therefore, the condition of this obligation is such, that if the above-named M'r's E. E. Patterson shall prosecute the said writ of error to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

E. E. PATTERSON. [L. S.]
M. A. HARRIS. [L. S.]

Taken and acknowledged before me this 10 day of February, A. D. 1876.

J. R. PURYEAR,
Clerk U. S. Cir. C't K. D.

This bond is approved, March 16, 1876.

B. J. PETERS, *C. J. K'y.*

31 STATE OF KENTUCKY,
Court of Appeals:

I, T. C. Jones, clerk of court appeals for State aforesaid, certify that the foregoing (5) pages contain a true copy of the writ of error and supersedeas bond on file in the case of E. E. Patterson v. Commonwealth, as certified by B. J. Peters, chief justice of said court.

Witness my hand and official seal this 17th March, 1876.

[SEAL.] T. C. JONES, *C. C. A.*,
By VIRGIL HEWITT, *D. C. C. A.*

32 *Citation.*

UNITED STATES OF AMERICA,
District of Kentucky, ss:

To the Commonwealth of Kentucky, greeting:

You are hereby cited and admonished to be and apper at the Supreme Court of the United States to be held at Washington City, in the District of Columbia, in and for the United States, on the second Monday, being 9th day of October next, pursuant to writ of error filed in the clerk's office of the appellate court of the commonwealth of Kentucky, wherein M'r's E. E. Patterson is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness the honorable B. J. Peters, chief justice of the appellate court of the State of Kentucky, this 14th day of March, in the year of our Lord 1876, and of our Independence the 100th.

B. J. PETERS,
Chief Justice of Kentucky.

33 Executed this citation this 22d day of March, 1876, by delivering a true copy thereof to E. W. Bagby, attorney and counsel for the Commonwealth of Kentucky.

J. H. ASHCRAFT, *Dep.*,
For E. H. MURRAY, *U. S. M. K. D.*

On the 22d day of March, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared J. H. Ashcraft before me, the subscriber, and makes oath that he delivered a true copy of the within citation to E. W. Bagby, attorney and counsel for the defendant in error, the Commonwealth of Kentucky.

J. H. ASHCRAFT.

Subscribed & sworn to before me this 22d day of March, 1876.

[SEAL.] J. R. PURYEAR,
Clerk U. S. Court.

34 STATE OF KENTUCKY,
Court of Appeals, sct.:

I, T. C. Jones, clerk of appellate court for State aforesaid, hereby certify that the foregoing two pages contain a true copy of a citation (with the return and affidavit endorsed thereon) now on file in my office, in the case of E. E. Patterson, appellant, vs. Commonwealth of Kentucky, appellee.

I further certify that a copy of the writ of error has also been filed in said case for the use of the commonwealth.

In testimony whereof, I have hereunto set my hand, at my office at Frankfort, the capital, this 1st day of April, 1876.

T. C. JONES, *C. C. A.*,
By VIRGIL HEWITT, *D. C.*

(Indorsement on cover:) No. 382. E. E. Patterson, plaintiff in error, vs. The Commonwealth of Kentucky. Kentucky c't of appeals. Filed 4th May, 1876.

Supreme Court United States,

MRS. E. E. PATTERSON, PLAINTIFF IN ERROR,

--VS--

COMMONWEALTH OF KENTUCKY. DEF'T.

BRIEF

-OF-

[redacted]

FOR PLAINTIFF.

Supreme Court United States,

MRS. E. E. PATTERSON, PLAINTIFF IN ERROR,

--VS--

COMMONWEALTH OF KENTUCKY. DEF'.T

In this case it is agreed that H. C. Dewit obtained a patent for a chemical combination called Aurora Oil, to be used as a burning fluid; that the plaintiff in error is his vendee for several counties in Kentucky, embracing McCracken county; that she kept an oil store on Broadway, Paducah, McCracken county, where she vended such Aurora Oil, and that she had been engaged in such business for some seven years, and that her business had continued to increase and the oil to gain in popularity as the people became familiar with it from use.

That after all this the Legislature of Kentucky February, 21, 1874. enacted a statute prohibiting the sale of *any* oil the product of coal or other bituminous substance as a burning fluid unless, on inspection, it would stand a test of 130 degrees fire heat before igniting Fahrenheit, providing for the appointment of Oil Inspectors in each county of the State, and denouncing penalties for a refusal to let the oil be inspected or for selling it after being inspected and condemned as not coming up to said standard which statute made no mention of or exception of patented oils, and which is made part of this record.

Under this statute, before taking legal advice, Mrs. Patterson, under protest, allowed the Inspector of Oils for McCracken county to inspect the oil then on hand, and he condemned and branded it, when she took legal advice and in pursuance to it still continued to sell the oil, when this prosecution in the City Court of Paducah was set on foot for selling the same, the city, by its charter, being the beneficiary of the fine, the number of barrels so sold was agreed and the amount of the fine $250—if she be subject to a fine, also agreed.

After the rendition of the verdict, by proper motions and orders a full discussion as to the validity of the State statute and its applications to patented oils were had, but the court held that the statute embraced patented oils and was valid, hence adjudged the penalty fixed by the verdict.

This judgment was appealed to the Appellate Court of the State and there affirmed. See its opinion.

Mrs. Patterson then removed the case into the Supreme Court of

the United States. In all these proceedings the validity of the patent and transfer to Mrs. Patterson by the patentee and that the article sold was the patented oil are conceded, both in the agreed facts and in the printed brief for appellee.

These two questions are involved: First, is patented oils embraced by the provisions of the State statutes? Second, if so embraced, is it so far valid?

I agree with appelee's counsel in saying that the State statute and the acts of Congress relating to patents ought to be construed as harmonizing if practicable, and this can be most rationally done by saying, as the State statute is general in its language, not mentioning patent oils, it should be construed as excluding them and embracing only the sale of such oils as the Legislature could legally restrain and which has not been authorized by Congress in exercise of a power surrendered by the States to it in the Federal Constitution, and I felt much confidence in that construction being given to it by the Appellate Court of Kentucky, but was disappointed, still my confidence in the proper construction of the State statute has not been shaken by this adverse decision. It may be that the Supreme Court will feel bound to so construe the State statute out of deference to the decision of the Appellate Court. If not, I feel sure it will take my view of the State statute; but I will not elaborate this point, although I feel great confidence in it.

On the second point appellee's counsel attempts to draw a distinction between the right to sell the patent right and the article patented, conceding that the State cannot prohibit the sale of the patent right, whilst claiming that it can prohibit the sale of the patented article.

With all due deference to the gravity of the question, the dignity of this august tribunal and the very high character of appellee's counsel and the plausibility of their argument, counsel may be permitted to say this looks very much like the anecdote of early times in the history of Kentucky, when the County Court granted a citizen a ferry across the Ohio river, but refused to grant or condemn a road leading to it, and that a patent right with a prohibition of the sale of the patented article would be about as valuable as a ferry without a road to it.

When a State destroys, as is done by the act of the Kentucky Legislature now under consideration, the right to make, sell or even use the *article* patented, does it not *per se* destroy the power to sell the county rights? No stronger proof of any fact could be advanced than the evidence of this case proves the correctness of this position. For, let the position taken by appellant be affirmed by Your Honors, and the right to make, sell and use Aurora Oil as an illuminating fluid in contravention of any State statute be upheld and sustained by the strong arm of a United States patent, and I can assure you $5,000 would not buy the nine county rights owned by appellant. On the other hand, let the views expressed by the Appellate Court of Kentucky be received as the true construction of the law, and this act of

the Kentucky Legislature remain upon its books and be enforced, and where is the party who would give five dollars for those county rights? Still the State of Kentucky maintains that when she destroys the right to make, sell and use the *article* patented she does not destroy the right to sell county rights. With as much plausibility might I argue that I will go into my neighbor's lot and dig up the roots of every tree therein growing, without design to interfere with the growth and propagation of those trees.

Appellee's counsel have evidently confounded the idea of the production of a patented machine, such as the dressed and tongued and grooved plank and mould made by a patented saw mill machine, and as found expressed in various decisions of the Supreme Court, with a patented composition or chemical combination. Nothing could be more delusive, for the products of a patented machine may be sold anywhere by any one, whilst the use and vending of the machine itself are exclusiveiy in the patentee and his vendee, and this distinction between the patented article and its product has caused appellee's counsel to lose sight of the important fact that a patented composition is itself the invention. I quote from Curtis on the Law of Patents, 3d edition, page 297, section 295: "But if the patentee be the inventor "or discoverer of a 'new manufacture or composition of matter not "known or used by others before his discovery or invention,' it is "clear that his franchise or sole right to use and vend to others to be "used, is the new composition and substance itself. The product and "process constitute one discovery, the exclusive right to vend which, "for a limited term, is secured to the inventor or discoverer." This Aurora Oil, like Goodyear's India-rubber, "is clearly not merely an "improved method or process of producing an old and well-known "composition or material, but is a new product, fabric, manufacture, "or composition of matter, having qualities possessed by no other "known material." And for a very intelligent exposition of this difference see Corning et als. vs. Benders. [15 How, 267.] Opinion by Mr. Justice Grier. If this be the character of Dewit's patented article, what property rights did his patent secure to him?

A patent is a contract between the public and inventor or discoverer, by which the latter discloses his knowledge for the public benefit after the expiration of the term, in consideration of which the Government secures to him the exclusive right to use, make and *vend* the article patented during the term.

The patentee is a purchaser from the public.

Curtis on Patents, p. xxiii, xxxv.

1 Fisher's Patent Reports, p. 252.

Ranson vs. New York.

"The grant of letters-patent creates a legal estate of a peculiar nature, consisting of the exclusive right to make, *vend*, or use the subject of the grant for a specified period." [Curtis, p. 154, section 167.]

The States surrendered to the Federal Government this right to contract and sell this peculiar privilege to such inventor or discoverer

as it might see proper, regulated by the laws of Congress and to confer on the patentee this peculiar legal estate, embracing not only the right to use but to vend the patented article. Now, without finding it to be a dangerous article, without finding it to be detrimental to the public welfare, can the State prohibit by any such General Statute the sale of the patented article in the face of the direct finding of the proper Federal authorities that it is both a new and useful invention or discovery?

It is conceded in the agreed facts that it has been constantly growing into public favor, and as said by the Supreme Court this is one of the strongest tests of the value of the invention.

If, in consideration of the disclosure of the invention, the United States Government contracts to secure to the inventor the exclusive use and right to vend the article for a given period and then the States have the power to prevent the vending of the article, then our whole patent system becomes a stupendous delusion and fraud, and the declared object of the surrender to Congress "to promote the progress of science and the useful arts" becomes a fallacy. The whole subject of granting letters-patent and the rights secured thereby belong to Congress and not to the different State Legislatures. It was designed to have a harmonious system, hence the surrender, for if left with the States an incongrous and discordant system must necessarily result from differences of interests, views and feelings. The police powers of the States are still left amply full and vigorous, but do not extend to the subjects surrendered to the Federal Government, as has been often and fully decided in relation to the regulation of commerce among the States, hence State laws requiring registration of vessels, owners, &c., are deemed incompatable with the regulations of Congress and invalid as to vessels properly licensed under the laws of Congress.

Sinnot et al. vs. Davenport et al., 22, How 238.

In Pregg vs. Pennsylvania, 16 Peters, 617, 18 the court said: "If "Congress have a constitional power to regulate a particular subject, "and they do actually regulate it in a given manner, and in a cer- "tain form, it cannot be that the State Legislatures have a right to "interfere, and, as it were, by way of compliment to the legislation of "Congress to prescribe additional regulations, and what they may "deem auxiliary provisions for the same purpose."

In April, 1869, the Legislature of Indiana, by statute, undertook to regulate the sale of patent rights by requiring the vender to file with the County Court Clerk where the proposed sale should be made a copy of the patent and an affidavit that the patent was genuine and not revoked, and that he has full authority to sell, and that any obligation given for such patent right shall set out "given for a patent right," and for a violation a fine of $1,000 or not more than six months' imprisonment were denounced.

Major Robi son, a duly authorized agent, May 23, 1870, sold to LeFever, a dentist, the right to use Goodyear's, administrator, and Cummings' invention for dental purposes in Grant county, Indiana,

and being imprisoned by judgment of the State court sued out of the United States Circuit Court for the District of Indiana a *habeas corpus* and was brought before Mr. Justice Davis, holding said court. [Fourth Fisher's Patent Cases, pp. 166-8.] Mr. Justice Davis held: "It is "clear that this kind of legislation is unauthorized. To Congress is "given, by the Constitution, the power to promote the progess of "science and the useful arts by securing, for limited times, to authors "and inventors the exclusive rights to their respective writings and "discoveries. This power has been exercised by Congress, who have "directed the manner in which patents shall be obtained, and when ob- "tained how they shall be assigned and sold.

"The property in inventions exists by virtue of the laws of Con- "gress, and no State has a right to interfere with its enjoyment, or to "annex conditions to the grant. If the patentee complies with the "law of Congress on the subject, he has a right to go into open mar- "ket anywhere in the United States and sell his property. If this "were not so, it is easy to see that a State could impose terms which "would result in a prohibition of the sale of this species of property "within its borders, and in this way nullify the laws of Congress."

And that is just what this Kentucky statute has done, if it be construed as embracing patented oils, for the prohibition of the sale of the patented article as effectually prohibits the sale of the patent right as if it in direct terms embraced it. The right to vend the patented article is as well secured by the laws of Congress as is the right to use the article, and both are as well provided for and secured as the sale of the patent itself.

Dewit has the right to use and vend the article, and were he selling the oil instead of his vendee, Mrs. Patterson, then the whole argument of appellee's counsel would be inappropriate. Yet she has the same rights and is as well secured in them as the patentee himself.

As all oils are known to be combustible, police regulations of the State or city might well extend to prohibiting an unreasonable accumulation of them at any one place at the same time in dense populations, thereby endangering the whole in case of conflagration, and this might well be without in the least impairing the right of sale. In fact, Paducah has, as perhaps all cities have, just such an ordinance, and this without complaint or resistance. This patent and the specifications discloses that this oil is mainly made of a very volatile and combustible material, which, because of its explosive nature, had but little commercial value, and that by the chemical combinations this explosive element has been so far destroyed or annulled as to leave it the most non-explosive of all the oils used for illuminating purposes, whilst it gives a clearer, brighter light, and is more cleanly than the other oils. It ignites at a much less degree of heat and gives out much less heat in the burning. These, together with its non-explosive qualities, have made it a popular favorite wherever used.

This State statute, without regard to the chemical combinations, and without providing tests by which to ascertain the non-explosive

qualities, or, in other words, without by any means ascertaining the relative safety of this patented oil, arbitrarily fixed 130 degrees of fire heat as the standard, when by any test of safety yet known this oil stands above any of the oils requiring 130 degrees of fire heat to ignite. Whatever may be said of this standard for the common oils, it is no test whatever as to this chemical combination.

This chemical combination making gasoline much safer as an illuminating fluid than the other oils, has added greatly to its commercial value.

As this patented oil cannot stand this arbitrary test, this State statute, if permitted to operate on it, in effect repeals the patent and destroys the patentee's and his vendees' rights under it in Kentucky, a result which in itself must condemn such operation. Even if the State, through its Legislature, has the right to judge for the public welfare, its judgment is not conclusive.

Cooley on Constitutional Limitations, p. 590, 35 N. Y. R. 454, Morgan vs. King. In this case, on full information, test and knowledge, the Federal Government has judged, on a subject peculiarly within its power and jurisdiction, that the patented article is new and useful

The State, in the absence of information, test or knowledge, by a General Statute attempts to judge on a subject not within its power or jurisdiction. Which judgment, in the absence of any fact showing the unsafety or inutility of the patented article, should prevail? If the State in this manner can assail and destroy the patent by prohibiting the sale of the patented article, it can in a similar manner destroy all patents, and thus in one way and another nullify and abrogate the whole system of patent laws enacted by Congress.

The rights of patentees and their vendees have often been before the courts, but most generally for alleged infringements by other persons, and the cases between the State and patentee or vendee have been seldom, and, so far as counsel is informed, have always been decided against the State, except in the cases of copyright of immoral books, and this infrequency is a potent argument in favor of the patentee, for it shows a general acquiesence by the States in the regulations of Congress and the rights growing out of the patent laws, and the settled conviction that such rights are not to be controlled by the States.

The celebrated case of Livingston vs. Van Ingen et al. 9 Johnson's Reports, so much relied on by appellee's counsel and regarded with importance by the Appellate Court of Kentucky, involved the several State statutes of New York, securing to Chancellor Livingston the exclusive right, for given periods, to navigate the waters of the State, upon consideration that he possessed the knowledge and would make the necessary expenditure in applying steam as a propelling power.

He did not pretend to be an inventor or discoverer, for, as a matter of fact, he was neither, but from others had obtained a knowledge

of the application of steam for such purpose. The adverse parties held no patents from the United States, but insisted that the several enactments in Livingston's behalf conflicted with the Constitution of the United States in the power conferred on Congress to regulate commerce and to secure to inventors and discoverers the exclusive right to use, vend, &c., the patented articles. And it is a singular fact that the argument of the Judges to the Senate of New York, made six and a half decades since, to prove that the States might well add to the privileges of patentees and make their patent rights more valuable, conceding, as each did, that the States could not destroy patent rights secured by the United States, is now brought forward by appellee's attorney to uphold the asserted right of the State to annul and destroy patent rights by legislating against the patented article and banishing it from the State

Judge Thompson, page 566, put the case in a strong light, thus: "The appellants do not, in the case before us, claim as *inventors* but "only as *possessors* of a mode of applying the steam engine to propel "boats on new and advantageous principles. The right, therefore, "claimed by them, as granted by the laws of this State, was beyond "the reach of Congressional authority, and the idea ought not for a "moment to be indulged that, even admitting this to be a foreign and "imported improvement, is it not worthy of legislative patronage and "protection The power given to Congress on this subject was in- "tended for the benefit of authors and inventors and to secure their "rights throughout the United States. The State could only give "this security within its own jurisdiction. * * * But because the "States have delegated to Congress this power, in a limited degree, "shall it be denied to them to lend their aid in protecting and patron- "izing useful improvements in any way they think proper, not repug- "nant to the right secured under the authority of Congress." And it was to impress this very principle on the Senate that Chief Justice Kent used the language quoted by appellee's counsel from 9th Johnson's Reports, p. 511. See their printed brief, p. 4. And he elaborated the idea that such legislation could not come in conflict with Congressional legislation; that no such conflict then existed, and could not be anticipated in the future, for this legislation was on a subject not embraced by the United States Constitution or patent laws of Congress, conceding, however, if there was such conflict that the State laws would have to yield, as the United States laws would be supreme.

There was really no question of patent rights before the court and certainly none involving a destruction of patent rights, hence the whole may be regarded as mere *obitur dictum* so far as this question now before the court is concerned.

No doubt a city might exclude gun-powder because of its explosive character; but suppose a State should attempt to exclude it entirely from the State because it should not be of an arbitrarily fixed specific gravity, and permit all gun-powder of such weight to be sold, could such a statute banish from the market a patented and safer gun-

powder merely because it failed of the specific gravity required by this arbitrary standard? This is not a *reductio absurdum*, and if it was, still is would illucidate the principle contended for by appellee's counsel.

How appellee's counsel arrives at the conclusion that the case of Dewit vs. the United States, 9 Wal., 45, is the patentee Dewit and relative to this Aurora Oil I don't know, for it is certain that neither a patent or patented oil is alluded to in the opinion, but only a single point decided, and that is that Congress cannot invade the territory of States and fix the standard of oils within their jurisdiction, as this would be a usurpation of the powers of the several States to regulate their own internal affairs and enact their police regulations. But because Congress may not constitutionally enact such laws it does not follow that the police powers of the States extend to all and every subject, especially to such subjects as has been surrendered to the United States. It is conceded that this statute can regulate the sale of all oils not patented by the United States, whilst Congress could not constitutionally enact a statute regulating the sale of such oils within the State. If the State may prohibit the sale of the patented article, is there any just or solid reason why it should not have the power to prohibit the sale of the patent? Indeed, as a principle of equity and of public policy, it would be far better to prohibit the sale of the patent than to allow it to be sold and then prohibit the sale of the patented article by the vendee. And this very case is a striking illustration of this principle. Mrs. Patterson paid some $2,300 for the right to make and vend this oil, but forbid the right to vend, and her property in the patent sinks to the most nominal value. And so far as she is concerned it would have been far better that the State had at once prohibited Dewit from selling his patent. The very inequity of the thing is a strong argument against the power as well as propriety of this State enactment.

The right to vend the patented article is one of the chief elements, if not the most valuable element, in all patents. Deprive the patentee of this valuable element and patent rights would scarcely be worth the obtaining. Indeed, would become hazardous, for capital could not then be safely invested in the manufacture of such articles.

As appellee's counsel say, the right of property in the material is protected by the State laws, but the property right in the exclusive privilege of vending is the creature of the patent laws of Congress. Mrs. Patterson's right of property in her Aurora Oil is protected by State law, but not so as to her exclusive right to vend it, for this is the creature of and protected by the laws of the United States. So far from protecting this peculiar property and estate the State is trying to destroy it, and herein comes a conflict between the two Governments, in which the United States Constitution and the laws of Congress must be supreme. But I will forbear any further elaboration, knowing the imcomparably superior knowledge of this august court to that of the counsel presenting this brief.

R. K. WILLIAMS.

Counsel

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

WRIT OF ERROR FROM THE KENTUCKY COURT OF APPEALS.

E. E. PATTERSON, PLAINTIFF IN ERROR,
vs.
COMMONWEALTH OF KY., DEFENDANT IN ERROR.

Brief of Defendant in Error.

E. W. BAGBY, C. S. MARSHALL, AND HENRY H. HOUSTON,

ATTORNEYS FOR DEFENDANT IN ERROR.

MARTIN & CO., PRINTERS AND BINDERS, PADUCAH, KY.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

E. E. PATTERSON, PLAINTIFF IN ERROR,
vs.
COMMONWEALTH OF KY., DEFENDANT IN ERROR.

} Brief of Defendant in Error.

The facts in this case are agreed. The Plaintiff confesses the truth of the allegations in the indictment; that is, that she sold for illuminating purposes, in the city of Paducah, oil, the product of coal or other bituminous substance which would not stand the test prescribed by the act of the Legislature of Kentucky, (see act approved Feb. 21, 1874, First volume Session Acts, 1873–4, page 40,) and that she continued to sell said oil, notwithstanding it had been tested by the inspector for McCracken County, Ky. and condemned by him, and branded "UNSAFE FOR ILLUMINATING PURPOSES." But she seeks to avoid the effect of the statute, by showing that the oil which she sold, to wit: the oil known as "Aurora oil" was a patented article, and that she was the assignee of the patent right for McCracken County, Kentucky. Relying on the further fact, which is admitted by the Commonwealth, that it is impossible to manufacture said patented Aurora oil so as to bring it up to the standard prescribed by the statute; that if the State statute is so construed as to apply to and include Aurora oil, it will amount to a prohibition of the sale of it, and will be the destruction of the patent right, granted by the United States Government, and secured to her by the Act of Congress.

The power of the Legislature of Kentucky to pass such a law as the one under consideration is unquestionable. In the language of Chief Justice Marshall in the case of Gibbons vs. Ogden, 9th Wheaton page 12:

"It forms a portion of the immense mass of legislation, which "embraces everything within the territory of a State NOT SURRENDERED "TO THE GENERAL GOVERNMENT; all of which can be most advan- "tageously exercised by the States themselves. Inspection laws, quar- "antine laws, health laws of every description, as well as laws for

"regulating the internal commerce of a State, and those which respect "turnpike roads, ferries, etc., are parts of this mass.

We consider it unnecessary to refer to authorities to show that police regulations are among the reserved powers of the States. That laws for the preservation of the safety and health of the citizens are police laws. That the act of the Kentucky Legislature in question is that description of law and the power to pass it is clearly within the reserved powers of the States. We shall not consume the time or patience of the Court by attempting to argue the constitutionality of the Act, for we do not believe that in its general application its constitutionality will be questioned. But it is contended that the patent laws of the United States are constitutional, and there being, as plaintiff contends, a conflict between the statutes of the State and the Act of Congress, the Act of Congress must prevail, by virtue of Section 2nd, Article 6th of the Constitution of the United States; "This Constitution and the laws "of the United States which shall be made in the pursuance thereof, "and all treaties made or which shall be made under the authority of "the United States shall be the supreme law of the land, and judges in "every State shall be bound thereby, anything in the constitution or "laws of any State to the contrary notwithstanding"

We do not intend to question the constitutionality of the patent laws of the United States, and we admit that if there is a clear and direct conflict between the laws of the United States made in the pursuance of the Constitution, and an act of the Legislature, that the law of the United States and the rights acquired thereunder must prevail, and the act of the State must yield.

But we believe there is no conflict between the patent laws of the United States and the Act of the Kentucky Legislature under consideration. The Act of Congress having been passed in the exercise of a clear power granted in the Constitution of the United States, and the Act of the Legislature of Kentucky, having been passed in the exercise of a reserved power, the acts should if possible be reconciled, and so construed that they may consistently stand together. In the case of Dewitt et al. vs. Davenport et al., 22d Howard, page 243, Judge Nelson in delivering the opinion of the Court says: "We agree that in "the application of this principle of supremacy of an Act of Congress "in a case where the State law is but the exercise of a reserve power, "the repugnance or conflict should be direct and positive, so that the "two acts could not be reconciled or consistently stand together, and "also that the Act of Congress should have been passed in the exercise "of a clear power under the constitution such as that in question.

The power of Congress to pass the patent laws is derived from the 8th clause of the 8th section of article 1 of the Constitution of the United States, which is in these words: "Congress shall have power " * * * * * * To promote the progress of science and the "useful arts by securing for limited times to authors and inventors the "exclusive right to their respective writings and discoveries.

The object of the patent laws then is to promote the progress of science and the useful arts. The mode, and the only mode by which this object can be accomplished by Congress, is by securing for limited times to authors and inventors the EXCLUSIVE right to their respective writings and discoveries. For the purpose of securing to authors and inventors for limited times, the EXCLUSIVE right to their respective writings and discoveries, with a view to promote the progress of science and the useful arts, the patent and copyright laws were passed. By the patent laws of the United States a new species of property is created, recognized and protected, distinct as we believe from the article manufactured by the application of the patented principle. My sewing machine, my churn, or my mowing machine is my property; but the patent right of the principle, or improvement, by the application of which the machine was made, belongs to the patentee or his assignee. My property in my machine is protected and regulated by the laws of the State. If it is taken, broken or injured, I sue in the State Court for redress. If it is stolen, I prosecute the thief in the State Court. The patent right, the property of the patentee or his assignee is protected by the laws of the United States. If his property is injured, if his patent is infringed, he obtains redress in the Courts of the United States. The laws of Congress regulate rightfully the manner of selling, transferring or assigning patent rights. The laws of the State regulate the manner of selling the manufactured article. So it is with regard to the copyright of books; the power of Congress to pass the copyright law is derived from the identical same clause of the Constitution, and there is the same distinction between the copyright and the book, as between the patent right and the thing patented. The patent right, like the copyright, is a species of incorporeal property, which is distinct from the corporeal thing with which it is connected. The one species of property, as we believe, is created, and entirely controlled and regulated, by act of Congress. The other is wholly subject to the regulation and control of, and is alone protected by, the laws of the State where it is situated or where its owner resides. Nor do we believe that because an article of property is patented, or to speak more correctly, is the result of a patented principle, that it is endowed with any privileges or immunities, or subject to any burdens. A patent plow is subject to the same law, may be subjected to the same taxes, sold in the same way, taken for debt in the same manner as may a plow not patented. And so we believe with Aurora oil, although patented, is subject to the same law to which all other oils are subjected.

The right of the Plaintiff to sell her oil is not derived from her patent, nor from the patent laws of Congress. If there was no patent for Aurora oil, and no patent laws, Plaintiff would have the same right to sell Aurora oil which she now has, and after her patent expires, if she has oil, she will have as much right to sell it then as she has now. The effect of her patent and the patent laws is not to give her the right to SELL, that right she must have by the laws of the STATE, or she has

none. The only thing the patent laws do for her is to EXCLUDE OTHERS from selling the same kind of oil; and thus give her a monopoly of the market for that kind of oil. And that is the extent of the power of Congress. Congress cannot make a market for her. It cannot force any one to buy from her; it can only prevent others from competing with her in the market.

Construing the patent laws of Congress according to the principle here contended for, we think there is no conflict between the laws of Congress and the Act of the Kentucky Legislature, which the Plaintiff has violated.

As stated above, the copyright laws of Congress derive their authority from the same clause of the Constitution which gives power to the enactment of patent laws. The object of both laws is the same, must be, as expressed in the constitution, to promote the progress of science and the useful arts; the patent laws, by securing to inventors the exclusive right to their discoveries for a limited time, the copyright laws by securing to authors the exclusive right to their literary productions for a limited time. The two sets of laws ought certainly to be construed alike, yet we suppose the learned and ingenious counsel for the Plaintiff will not contend that States have no right to prohibit the circulation of publications injurious to the morals or peace of the community, although such publications may have been copyrighted according to the laws of Congress. The right of the States to do this has always been exercised, and has never, so far as we can ascertain, been questioned. It has been frequently recognized by the DICTA of Judges of the Supreme Court of the United States, and by other judges.

In the case of Livingstone vs. Van Ingen, 9 Johnston, page 581, Chancellor Kent, speaking of the clause of the Constitution from which the right to pass the patent and copyright laws is derived, uses this language: "Again the power granted to Congress goes no further than "to secure to the author or inventor a right of property, which, like "every other species of property, must be used and enjoyed within each "State according to the laws of such State. The power of Congress is "only to define the rights of property. It does not extend to regulating "the use of it. That must be exclusively of local cognizance. If the "author's book or print contains matter injurious to the public morals or "peace, or if the inventor's machine or other production will have a per-"nicious effect on the public health or safety, no doubt a competent "authority remains with the States to restrain the use of the patent "right. That species of property must likewise be subject to taxation "and the payment of debts, as other personal property. The national "power will be fully satisfied, if the property created by patent be, for "the given time, enjoyed and used exclusively, SO FAR as under the "policy of the several States the property shall be deemed fit for tolera-"tion and use. There is no need of giving this power any broader "construction in order to attain the end for which it was granted, which

"was to reward the beneficent efforts of genius and to encourage the "useful arts."

In the United States Internal Revenue Act of March 2d, 1867, the 29th section prescribes a penaly of fine and imprisonment for selling or offering to sell oil made of petroleum for illuminating purposes, inflammable at a less temperature or fire test than 110 degrees Fahrenheit. An indictment was presented in the U. S. Circuit Court for the Eastern District of Michigan against DeWitt for selling oil, which by the way is the identical Aurora oil for the selling of which the Plaintiff in this case was indicted. In that case, DeWitt vs. the United States, reported in 9th Wallace, page 40, the Chief Justice in delivering the opinion of the Court, says: (page 45) "As a police regulation relating "exclusively to the internal trade of the States, it can only have effect "when the legislative authority of Congress excludes territorially all "State Legislation, as for example in the District of Columbia, within "State limits it can have no constitutional operation. This has been so "frequently declared by this Court, results so obviously from the terms "of the Constitution, and has been so fully explained and supported on "former occasions, that we think it unnecessary to enter again upon the "discussion.

We have the direct decision of the Supreme Court, that Congress has no power to control or regulate the sale of these dangerous oils, such control or regulation partaking of the nature, and being in fact, police regulations entirely within the control of the State. In the license cases, 5th Howard, Mr. Justice McClean, speaking for the Court, says: "The acknowledged police power of a State extends often to the "destruction of property. A nuisance may be abated, everything preju- "dicial to the health or morals of a city may be removed, merchandise "from a port where a contagious disease prevails, being liable to com- "municate the disease, may be excluded, and in extreme cases it may be "thrown into the sea. This comes in direct conflict with the regulation "of commerce; and yet no one doubts the local power. It is a power "essential to self preservation, and exists necessarily in every organized "community. It is indeed the law of nature, and is possessed by man "in his individual capacity. He may resist that which does him harm, "whether he may be assailed by an assassin or approached by poison; "and it is the settled construction of every regulation of commerce, that, "under the sanction of its general laws, no person can introduce into a "community malignant diseases, or anything which contaminates its "morals or endangers its safety. And this is an acknowledged principle "applicable to all general regulations. Individuals in the enjoyment of "their own rights must be careful not to injure the rights of others.

"From the explosive nature of gunpowder, a city may exclude it. "Now this is an article of commerce, and is not known to carry infec- "tious disease; yet to guard against a contingent injury a city may "prohibit its introduction. These exceptions are always implied in "commercial regulations, when the general government is admitted to

"have the exclusive power. They are not regulations of commerce, "but acts of self-preservation, and although they effect commerce to "some extent, yet such effect is the result of the exercise of an undoubted "power in the State.

"In the same case on page 571, Mr. Justice Woodberry says: "It "is conceded that the States may exclude pestilence either to body or "mind, shut out the plague or cholera, no less, obscene paintings, lottery "tickets and convicts. * * * * * * * * *

"How can they be sovereign within their respective spheres with-"out power to regulate all their internal commerce as well as police, "and direct how, when, and where it shall be conducted, in articles "intimately connected either with public morals, public safety, or the "public prosperity.

In the same case, page 578, Mr. Justice Grier says: "It has "frequently been decided by this Court that the powers which relate "to merely municipal regulations, or what may be more properly "called internal police, are not surrendered by the States or restrained "by the Constitution of the United States, and that, consequently, in "relation to these the authority of a State is complete, unqualified and "conclusive, without attempting to define what are the peculiar sub-"jects or limits of this power, it may safely be affirmed that every law "for the restraint and punishment of crime, for the preservation of the "public peace, health and morals, must come within this category. As "subjects of Legislation, they are, from their very nature, of primary "importance; they lie at the formation of social existence; they are for "the protection of life and liberty, and necessarily compel all laws on "subjects of secondary importance, which relate only to property, con-"venience or luxury, to recede, when they come in conflict or collision; "*salus populi suprema lex.*

"If the right to control these subjects be complete, unqualified and "exclusive in the State Legislature, no regulations of secondary impor-"tance can suspend or restrain their operations on any ground of "prerogative or supremacy. The exigencies of the social compact re-"quire that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public "health, compel mere commercial regulations to submit to their control. "They restrain the liberty of the passengers; they operate on the ship, "which is the instrument of commerce, and its officers and crew, the "agents of navigation. They seize the infected cargo and cast it over-"board. The soldier and the sailor, though in the service of the gov-"ernment, are arrested, imprisoned and punished, for their offences "against society. Paupers and convicts are refused admission into the "country. All these things are done, not from any power which the "States assume to regulate commerce or to interfere with the regulations "of Congress, but because police laws for the preservation of health, "prevention of crime and protection of the public welfare, must of

"necessity have full and free operation, according to the exigency which "requires their interference.

Other references might be made to show the importance ascribed to police regulations, and the necessity for upholding them; and to show that never, unless the conflict between the police regulations of the State and the Act of Congress is so clear that there is no possible way of reconciling the two, will the police regulations be declared void. But we think the above quotations are sufficient for the purpose.

We think the case referred to by the Plaintiff's counsel, decided by Judge Davis in the U. S. Court in Indiana, reported by Fisher, is not at all inconsistent with the principle for which we contend. In that case, (we speak from recollection, the book not being accessible to us at this time) the statute of Indiana requires that the owners of patents or their agents, before selling or offering to sell patent rights in that State, shall file a copy of their patent, or assignment of it, if assigned, in the Clerk's office of the county in which the right to sell was offered, and prescribed a penalty for the violation thereof. Judge Davis decided the Indiana statute unconsitutional, because Congress alone had the power to regulate the sale of patent rights. This applied to the sale of the patent right, and is entirely consistent with the principle for which we contend, and is a difierent thing, as we believe, from the sale of the manufactured article, which was entirely under the control of the State. If we have succeeded, in the former part of this argument, in showing the difference between the property in the patent right and the property in the thing patented, the inapplicability of the case in Fisher to the present case is obvious.

It is strange, if the fact of an article being patented puts it beyond the control of the State laws. The State may regulate the sale of gunpowder, may prohibit its sale in cities, etc., but if nitro-glycerine is a patented article the State has no control over it! The Congress of the United States cannot prescribe any test for illuminating oils, as was decided in DeWitt vs. the United States, 9th Wallace, 41, because such tests belong to the internal police of the States. To say that the States cannot prescribe such tests for the protection of her citizens from the dangers arising from such oils, because they are patented, seems too absurd for argument. Nor can we believe that such is the law.

We think the rights and powers of the States to protect their citizens from the danger arising from the use of such oils are perfectly consistent with the patent laws of the United States properly construed. That the act of the Kentucky Legislature is constitutional, and applies to Aurora oil, although patented.

We respectfully ask an affirmance of the judgment of the Court below.

E. W. BAGBY,
C. S. MARSHALL,
HENRY H. HOUSTON,
} Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

TERM OF 1878–1879.

No. 117.

E. G. PATTERSON, PLAINTIFF IN ERROR,

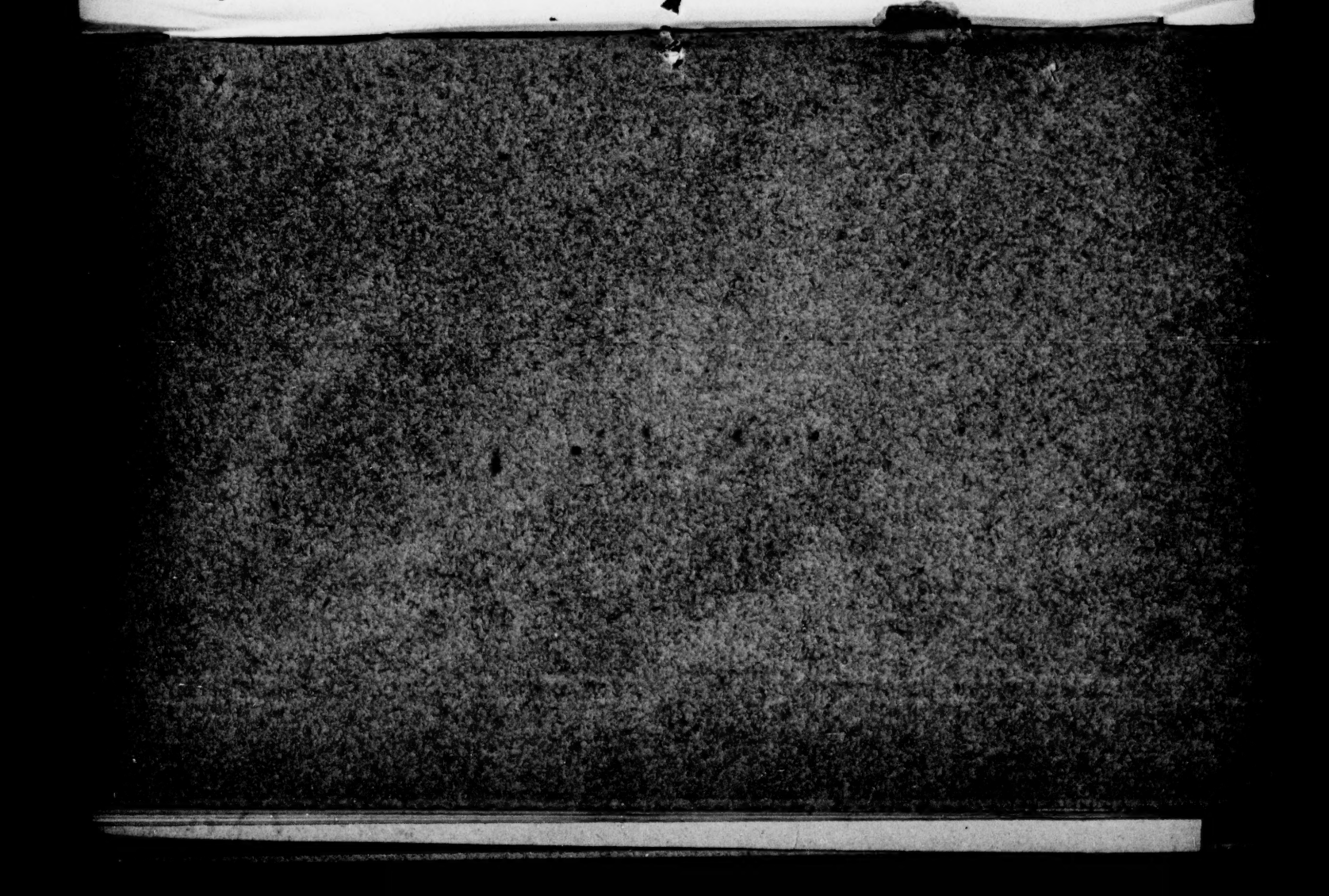
vs.

THE COMMONWEALTH OF KENTUCKY.

BRIEF OF DEFENDANT IN ERROR.

ALBERT PIKE,
ROBERT W. JOHNSON,
LUTHER H. PIKE,
Of Counsel.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER,
Corner of 9th and D streets.
1878.



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Patterson vs. The Commonwealth of Kentucky.

Brief of Defendant in Error.

The notion of the counsel of the plaintiff in error is, that there is a conflict between the Statute of Kentucky which prohibits the sale of mineral oil igniting at a lower temperature than 130 degrees, and the rights conferred on a patentee of such oil by the Constitution of the United States.

It is singular that the whole notion and argument is based upon the misapplication of a phrase, on a verbal quibble.

Congress, the counsel say, *has authorized the sale of such oils*, in the exercise of a power surrendered by the States to it in the Federal Constitution.

But Congress has not *authorized the sale* of anything patented. The patentee has no larger *right* to sell than if he manufactured the article without patent. His right, under the patent, is to prevent others from manufacturing and selling it; the patent thus securing to him a wider field in which to exercise his right, and excluding competitors.

How, then, does the counsel get this notion, that the patent gives the right to sell?

From the phrase in the Constitution, "securing to inventors the exclusive right to their discoveries," by which the counsel understands that there is secured to the inventor "*the exclusive right* to use, make, and right to vend the article patented;" and "*the right to vend* the patented article is secured by the laws of Congress."

"The patent, under the act of Congress, and by the Constitution, *gives the exclusive right* to sell, *ergo*, it gives the right to sell." That is the logical proposition, on which the argument proceeds. It is simply a play on words. If the phrase "secures the exclusive right to sell" is accurate in point of grammar, is good English (which it is not), it does not mean "secures the right to sell and makes the right which it creates exclusive." It means only "makes exclusive the right to sell," a right *not* created by it.

To give the monopoly is the only way to "secure to the inventor the exclusive right to his discovery;" a phrase which itself means "to make the inventor's right exclusive."

That is really all there is of this case. The patent does not give a right to sell. It makes the right, without enlarging it, exclusive, by excluding sale of the same article by others.

If, therefore, the use of a patented article is deemed by the Legislature of a State, or even of a City, dangerous and unsafe, and likely to cause destruction of life as well as of property, the fact that only the patentee can sell it in no manner disenables the Legislator to forbid its sale; but the right to sell is not increased by the patent.

The Court of Appeals of Kentucky said in this case, that the patentee "held his right subject to the paramount claims of society, which requires that his enjoyment may be modified by the exigencies of the Commonwealth."

11 Bush, 311.

The same clause of the Constitution secures to authors the exclusive right to their writings. Congress has given effect to this by the copy-right law. I do not get my *right to sell* a book, which I have written, printed and published, by or from either Constitution or Statute. I have the right without either, and it is a plenary right. It can no more be enlarged or sanctified by Congress, than the infinite power of the Deity can.

And my right to publish and vend my book in a particular State may be denied by the State, if the book be licen-

tious and obscene. This is where the *Salus Populi* is supreme over individual right. In fact one *has* no right to sell an obscene book, and corrupt the morals of the young, or a dangerous compound likely to explode and destroy life and property, any more than he has a *right* to shoot into a crowd of men, or sell clothing infected with small-pox. One must so use his own as to do no harm to others.

Sic utere tuo ut alieno ne lædas, is a maxim approved by Lord Coke; and *Salus Populi suprema lex esto* was the 13th Law of the 3d of the Twelve Tables. And Cicero even says,—

> Derelictio communis utilitatis contra naturam est:
> The desertion of the Commonwealth is unnatural.

And if the right to sell at all were the creature of the law, the power of the State would still be plenary to forbid the sale of dangerous compounds for common use. The principle is well stated by Pliny the Younger, in the terse words, Oportet privatis utilitatibus publicas, mortalibus æternas anteferre: "The public utility is always to be preferred to the private, things eternal to the transitory."

The text writers speak of patents as giving "the exclusive right to use an *invention*," "the sole right to use an *invention*;" and say that it grants the inventor a *monopoly* in his *invention*, for a limited time.

The Cloth-workers of Ipswich Case, Godb., 252, says: "The King may grant by charter unto him, that he only shall use such a trade or trafique for a certain time."

The effect of a patent is to grant a sole or exclusive privilege.

The power of Congress is, only to ascertain and define the rights of property in the invention or work; it does not extend to regulating the *use* of it. This is exclusively of local cognizance. Such property, like any other species of property, must be used and enjoyed within each State, according to the laws of such State.

Livingston v. Van Ingen, 9 Johns. R., 581,
per KENT, Ch. J.

The Constitution and law, taken together, give the inventor an inchoate property in his invention, which is completed by suing out a patent. This inchoate right is exclusive. It is "an exclusive right to the *discovery*," that the Constitution authorizes Congress to secure to the inventor.

Per MARSHALL, Ch. J.—

Evans v. Jordan, 1 Brock., 252.

But it is evidently not correct to say that legislation or the patent *creates* a right of property in the invention. What one discovers and invents is *his*, he has the proprietorship of it, for he may, if he sees fit, use it for his own benefit only, making it known to no one, and he may lawfully sell it for a price, and the sale will have a valid and valuable consideration, without any aid from law or patent. A man is proprietor of even his thoughts, and may sell them. The law and the patent or copy-right *protects* his proprietorship, by giving him the exclusive right to use or to sell the invention or thought, and the machine or book.

So BALDWIN, J., said, "the patent gives a right of property in the thing patented, which is entitled to full protection in courts."

Whitney v. Emmett, Baldwin, 322.

There is the same inexactitude in this expression. Proprietorship is older than the statute law which protects it. If the law gave no action for the recovery of a chattel, there would still be proprietorship of it. Society could not exist without it. Juvenal thought it something for a man *unius sese dominum fecisse lacertæ;* and if it were a tame one, he might be owner of a lizard, though the law might not protect his ownership.

The Constitution, laws and patent give a right of property in the invention; but a party has not necessarily a right to use an invention in any State, *merely* because he has a patent for it under the United States.

Vannini v. Paine, 1 Harring., 68.

Vannini was the inventor and patentee of a mode of drawing lotteries, and making schemes on combination and

permutation principles. The suit was by bill, to enjoin a party from using it.

The Court said that there was a law of the State in force, forbidding lotteries, as pernicious, destructive to frugality and industry, introductive of idleness and immorality, and against the common good and general welfare. "It therefore cannot be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might with as much propriety claim a right to commit murder with an instrument, because he had a patent for it as a new and useful invention."

In Jordan v. The Overseers of Dayton, 4 Ohio, 307, the very same ground was taken as is assumed in this case; that is, "because the patent securing the exclusive right of preparing, &c., emanated from the General Government under the authority of the Constitution, and its full effect cannot be had unless it be holden altogether exempt from the State control." And the Court said: "The sole operation of the statute is to enable the inventor to prevent others from using the products of his labours, except with his consent. *His own right of using is not enlarged or affected.*"

In the language of KENT, "The National power will be fully satisfied, if the property created by the patent be, for the given time, enjoyed and used exclusively, *so far as, under the policy of the several States, the property shall be deemed fit for toleration and use.*

ALBERT PIKE,
ROBERT W. JOHNSON,
LUTHER H. PIKE,
Of Counsel for the Commonwealth of Kentucky.